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In The Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF MOUNT VERNON and JAMES GLEASON, Individually and as Commissioner of the Fire Department of the City of Mount Vernon, New York,

Petitioners,

v.

MATTHEW T. STONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit's fact-specific decision establishes an overriding legal issue for the Supreme Court to review.

2. Whether the Second Circuit's fact-specific decision conflicts with the fact-specific decisions of the Eleventh Circuit and the District Court of Maryland.

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STATEMENT OF THE CASE

This case involves the fact-specific issue whether Respondent Matt Stone, a firefighter rendered paraplegic by an off-duty accident, is able to perform the "essential functions" of a firefighter assigned to the Fire Prevention Bureau ("FPB") or the Fire Alarm Bureau ("FAB") of the Mount Vernon Fire Department ("MVFD"). The MVFD staffs its fire department in such a way that fact issues exist whether firefighters assigned to the FAB and FPB are required to perform customary fire suppression operations in addition to their specialized fire prevention and alarm duties. Stone, who is able to walk with the assistance of leg braces, negotiate curbs and ramps with his wheelchair, drive a car outfitted with special hand controls and climb and descend stairs out of his wheelchair, can perform all of the specialized fire prevention and alarm duties required of firefighters assigned to the FAB or FPB. Since the issues to be tried are specific to the MVFD's staffing decisions and to Stone's physical capabilities, there are no issues of nationwide importance to be addressed by the Supreme Court and the writ should be denied.

A. Procedural History

In November, 1994, Stone requested that he be returned to active duty and assigned to a vacant position in which his disability could be accommodated. In May 1995, Stone was informed that he would not be accommodated and

that he could not return to work. Stone commenced an action in the United States District Court for the Southern District of New York under the Americans with Disabilities Act, 42 U.S.C. § 12131-34, Section 504 of the Federal Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 and the New York Human Rights Law, N.Y. Exec. Law § 296. The District Court granted summary judgment dismissing the complaint on the ground that no rational trier of fact could conclude that Stone was able to perform the essential functions of the job of firefighter, and therefore he was not qualified within the meaning of the federal disability statutes. The Second Circuit reversed and remanded for trial after finding that genuine issues of fact exist whether fire suppression is an essential function of a position in one of the MVFD's specialized bureaus, and whether the MVFD could reasonably accommodate Stone's disability by assigning him to such a position.

B. Background

The MVFD, which employs 109 firefighters, has mutual-aid agreements with neighboring towns for assistance during multi-alarm fires. The MVFD has two specialized "light duty" bureaus: the FAB and the FPB. The duties of employees assigned to FAB include receiving and transmitting alarms of fires, answering telephones, and performing related paperwork. Firefighters assigned to FAB assist non-firefighter dispatchers in dispatching firefighters to calls for service. The principal duties of the rank and file

firefighters assigned to FPB are enforcing the New York State Uniform Fire Prevention and Building Code and the Department's Fire Prevention Code, reviewing architectural plans and designs, meeting with builders, and performing inspections of buildings. Firefighters assigned to FPB may also be called upon to serve as guides to assist mutual-aid fire companies by meeting them at the City's border and leading them to the site of the fire; the guide travels either in the visiting fire rig or in a separate car. Both the FAB and the FPB have permanent positions.

Stone was hired by the MVFD as a firefighter in January, 1990. In December, 1992, while off-duty, he was helping friends to remove from a house a tree that had been uprooted by a storm; the tree suddenly sprang upright, throwing Stone to the ground. He sustained injuries inducing paraplegia, and was initially paralyzed from the waist down. After undergoing physical rehabilitation, Stone is able, with the assistance of leg braces, to walk for a few hours at a time. He also uses a wheelchair, in which he can negotiate curbs and ramps; and he has a car that is outfitted with special hand controls that enable him to drive. Stone can get in and out of his car and his wheelchair without assistance. He is also able to climb and descend stairs out of his wheelchair while pulling the chair along with him.

Since his accident, Stone has remained active in his profession, passing the lieutenant's examination and serving as an instructor at the Westchester County Career Chiefs'

Fire Academy, where he teaches fire-and-rescue-related courses to probationary firefighters from Westchester County. As an adjunct instructor at the New York State Fire Academy, he has taught a similar course to probationary firefighters from around New York State.

C. Issues of Fact Concerning the Essential Functions of FAB and FPB

The record demonstrates that an issue of fact exists whether fire suppression is an essential function of the duties of firefighters assigned to the FAB or FPB in the MVFD. Firefighter John Koch was assigned to FPB permanently in 1985 and continued to serve in FPB at the time of his 1996 deposition. Koch testified that during all his years in FPB, he was never called to engage in fire-suppression activities. Firefighter Nicholas Ionta was transferred into FPB in the early 1970's following an automobile accident. He remained assigned to FPB until he retired at the end of 1994. Ionta testified that during his more than 20 years in FPB, he served as a guide for mutual-aid fire companies, but he never was called upon to fight a fire. MVFD presented no evidence that any firefighter assigned to FAB or FPB ever was required by the MVFD to engage in fire suppression duties other than acting as a guide for mutual aid fire departments, even during Mount Vernon's largest conflagrations.

MVFD implicitly admits that Stone can perform the essential functions of a firefighter assigned to one of the specialized bureaus, because it concedes that it can accommodate him by employing him in one of those bureaus. Chief of Operations Henry Campbell viewed Stone as well qualified for assignment to FAB but, with the agreement of the Commissioner, decided not to assign Stone to that bureau. Campbell expressed concern that such an assignment might in the future require the MVFD either to hire persons who were not as well qualified as Stone or to overload those bureaus with disabled individuals. Campbell testified as follows:

> I don't think there's a finer young person I ever met than Matt [Stone] and I think he would be an asset up there. I just envisioned what happens or what would happen down the road. Would we be forced to put everybody that got hurt there? Would it open the door for individuals who may already have some sort of a physical - a physical handicap who are not capable of meeting this standard . . ., but then would that allow them, now that I took care or assigned Matt to the Fire Alarm Bureau as a dispatcher, would that allow somebody to show up and say that I want to take this exam and I want that same kind of job? Those were the things that compounded our . . . reasoning . . .

> [W]e can't accommodate ten people or five people, and that's what the difficulty is. That's really what it comes down to.
>
> Can we accommodate Matt Stone up there? I certainly can. I certainly can. [sic] And do we need him up there? Yeah, we need him.

(App. A at 8a).[1]

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT'S DECISION ESTABLISHES NO OVERRIDING LEGAL ISSUES AND DOES NOT CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS

In *Stone v. City of Mount Vernon, et al.*, 118 F.3d 92 (2d Cir. 1997), the Second Circuit held that on the particular facts gleaned from the undeveloped record in this case, Respondent Matthew T. Stone had established a prima facie case of discrimination sufficient to avoid summary judgment. (App. A at 22a). Since the Second Circuit's holding presents no question of exceptional importance for this Court to

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[1]"App. A" refers to appendix "A" of the Petition for a Writ of Certiorari.

address and does not conflict with other circuit courts of appeals, the writ should be denied.

The Second Circuit determined that the proper analysis under the federal disability statutes and their enabling regulations was "fact-intensive." (App. A at 14a). Whether Stone was able to perform the "essential functions" of a firefighter assigned to the FPB or the FAB of the MVFD necessarily depended on what the "essential functions" of those positions were. Courts have consistently held that determination of a position's "essential functions" is a fact-specific determination. *See, e.g., Champ v. Baltimore County*, 884 F. Supp. 991 (D.Md. 1995), *aff'd*, 91 F.3d 129 (4th Cir. 1996); *Wenner v. City of New York Dep't of Sanitation* 1996 WL 30289, at *3 (S.D.N.Y. 1996).

The Second Circuit rejected Petitioners' illogical and overbroad argument that the essential functions of a firefighter assigned to the FPB or FAB in the MVFD, indeed of any firefighter anywhere, must as a matter of law include fire suppression operations. The Second Circuit recognized that the City of Mount Vernon has the right to staff its fire department by designating a small number of firefighter positions for specialized fire prevention and alarm duties, while at the same time insulating them from fire suppression operations. The record demonstrates that firefighters assigned to the FPB and FAB in Mount Vernon have never been required to perform fire suppression operations, even when the MVFD's own on-duty force has been insufficient

to suppress a fire. (App. A at 20a). In those instances, the MVFD's consistent practice has been to call in mutual-aid fire companies from neighboring towns, rather than instruct its on-duty FAB or FPB members to suit up to suppress the fire. (App. A at 20a).

On these specific facts, the Second Circuit correctly held that a triable issue of fact exists whether fire suppression operations are an essential function of the position of an FPB or FAB firefighter in the MVFD. Construing its own decision extremely narrowly, the Second Circuit instructed:

> We in no way suggest that the essential duties of a firefighter do not normally include fighting fires. However, proper analysis of a claim under the federal disability statutes, must be focused on "the fundamental job duties *of the employment position the individual with a disability . . . desires,"* 29 C.F.R. § 1630.2(n)(1) (emphasis added), rather than solely on the title held by a person occupying that position or the other positions occupied by most persons holding that title.

(App. A at 19a). The Circuit correctly held that the District Court should have focused more closely on the job duties of firefighters assigned to FAB or FPB in the MVFD, not on the stereotypical functions a firefighter customarily performs. (App. A at 19a). Since the Circuit Court's holding is fact-

specific and legally narrow in scope, it does not establish any overriding legal issue for the Supreme Court to address.

Further, the narrow holding of the Second Circuit does not conflict with the holding of the Eleventh Circuit in *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) or with the holding of the District Court of Maryland in *Champ v. Baltimore County*, 884 F. Supp. 991 (D.Md. 1995), *aff'd without opinion*, 91 F.3d 129 (4th Cir. 1996). In *Holbrook*, the Eleventh Circuit affirmed the District Court's dismissal of a police detective's ADA and Rehabilitation Act claims on the ground that he was not able to perform the essential functions of a police detective in the City of Alpharetta, Georgia. Like the Second Circuit in *Stone*, the Eleventh Circuit considered its decision to be extremely fact-intensive and instructed:

> It is critical to note that our conclusion is mediated by the facts presented in this case. Our decision is informed by several specific factors, including the unique nature of police work, the particular realities of a small police department in which each of three detectives is expected to be able to respond to any situation, and the types of accommodations proposed by Holbrook. We do not imply that an employer invariably is absolved from having to make reasonable accommodations for a disabled employee whenever a given job

> involves any measure of unpredictability, nor do we suggest that police departments in general cannot be held strictly to the standards set forth in the ADA.

Holbrook, 112 F.3d at 1528, n.4.

The Eleventh Circuit's expressly narrow and fact-intensive holding is readily distinguishable from *Stone* on its facts. Specifically, the plaintiff in *Holbrook* did not dispute that he was unable to perform two functions of the position he desired. *Holbrook*, 112 F.3d at 1527. Stone provided undisputed evidence that he could perform all of the functions of the position he desired, that is, an FAB or FPB firefighter. Next, the Eleventh Circuit found that the Alpharetta police department is staffed in such a way that:

> if the "unexpected" happened and more than one rape or murder occurred simultaneously in Alpharetta, or if what appeared to be a burglary turned out also to involve a homicide, this minor "reshuffling" of case assignments proposed by Holbrook necessarily would require the reallocation of an essential part of his job.

Holbrook, 112 F.3d at 1528. Not so in *Stone*, where the record demonstrated that when the MVFD's own on-duty fire suppression force has appeared to be insufficient to suppress

a fire, the MVFD's consistent practice has been to call in mutual-aid fire companies from neighboring towns, not to require that FAB or FPB members suppress the fire. (App. A at 20a).

The narrow and fact-specific holding in *Stone* is also readily distinguishable from the District Court's decision in *Champ v. Baltimore County*, 884 F. Supp. 991 (D.Md. 1995), *aff'd*, 91 F.3d 129 (4th Cir. 1996). There, a disabled police officer who was unable to make forcible arrests was terminated at the end of his 251 day light duty assignment. *Champ*, 884 F. Supp. at 994-96. The police officer sued and the Court dismissed the complaint on summary judgment holding that the ability to make forcible arrests was an essential function of the position of police officer in the Baltimore County police department. The Maryland court's decision is distinguishable for a number of reasons.

First, the Maryland court specifically relied on the fact that the police officer failed to specify the exact accommodation he sought. *Champ*, 884 F. Supp. at 1000. Stone properly requested reassignment to a vacant position in the FAB or FPB, an accommodation recognized as reasonable by the plain terms of the statute. 42 U.S.C. § 12111(9)(B).

Second, the Maryland court granted summary judgment because the police department did not have any permanent light duty positions, let alone a vacant one into

which the police department could transfer the plaintiff. *Champ*, 884 F. Supp. at 1000. In *Stone*, the collective 30 years spent by firefighters Koch and Ionta in the FPB permits a finding that the MVFD provides for career placement in its non-fire suppression bureaus. (App. A at 21a). Further, the record demonstrates that at least two vacancies in the FPB existed after Stone requested a reasonable accommodation. (App. A at 6a).

Third, the Maryland court found that forcible arrests were required of all police officers. *Champ*, 884 F. Supp. at 997-98. In *Stone*, the record demonstrates that neither firefighter Ionta nor Koch was ever called to fight a fire in their collective 30 years in the FPB, (App. A at 7a), creating an issue of fact whether all MVFD firefighters are required to suppress fires.

Finally, the Maryland court relied on testimony that police officers may be confronted with crimes in progress during lunch break, which require them to take action. *Champ*, 884 F. Supp. at 999. The record demonstrates that firefighters in the MVFD have no such obligation when they are off-duty. (App. A at 20a).

Petitioners' prediction that the Second Circuit's decision in *Stone* will result in dire and far-reaching consequences has no basis in the record. We know from experience that off-duty police officers may someday be required to discharge a handgun. We also know from

experience that flight attendants may someday be required to perform emergency operations. However, the record in *Stone* does not support Petitioners' contention that firefighters assigned to FAB or FPB may someday be required to suppress a fire. The record indicates otherwise: whenever the MVFD's own on-duty fire suppression force has appeared to be insufficient to suppress a fire, the MVFD's consistent practice has been to call in mutual-aid fire companies, not to request that FAB or FPB members suit up to suppress the fire. (App. A at 20a). Since there is no evidence that FAB or FPB members have ever been required to suppress a fire, an issue of fact remains whether FAB or FPB members ever will be required to suppress a fire.

Petitioners also assert that the Second Circuit's decision will require them to change their civil service test for firefighters. Since the record below does not contain any evidence concerning MVFD's civil service test, it is impossible to determine the effects, if any, the Second Circuit's decision will have on the test's alleged physical strength or endurance requirements. Without any factual record upon which to rely, it is improper for Petitioners to assert, without basis and for the first time before this Court, that the test's requirements will need to be altered. Petitioners' argument should be rejected.

II.

THE LACK OF A FACTUAL RECORD FAVORS DENYING THE WRIT

The Petition should also be denied because the procedural posture of the case does not lend itself to Supreme Court review. Significantly, the Second Circuit remanded the case back to the District Court for trial. At trial, a full record can be developed concerning the essential functions of a firefighter in the MVFD assigned to FAB or FPB. The Supreme Court's review of this case to determine whether fire suppression is an essential function of every firefighter's job, in the face of a summary judgment record that permits a reasonable inference to be drawn that it is not, seems a premature and wasteful use of the Court's limited resources. The writ should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the writ be denied and that the case be remanded to the District Court for trial.

Respectfully submitted,

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